

APPEAL NO. 021144
FILED JUNE 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 16, 2002. The hearing officer determined that the respondent/cross-appellant (claimant) sustained a compensable injury "in the form of an exacerbation of a previously existing hernia" on _____, and that the claimant does not have "disability as a result of an injury on _____."

The appellant/cross-respondent (carrier) appeals the determination that the claimant sustained a compensable hernia injury as being "incredulous" and "manifestly unjust." The claimant appealed the disability determination on the basis that she had hernia repair surgery and that it is "common knowledge" that recuperation from hernia surgery is "at least 6 weeks of no lifting." The carrier responds to the claimant's appeal urging affirmance of the disability determination.

DECISION

Affirmed in part and reversed and remanded in part.

While the cause is in dispute, it is clear that the claimant had an "upper midline ventral hernia"; that there was hernia repair surgery performed on November 12, 2001; that an infection, which required draining, resulted from that surgery; and that the claimant had a second surgery for "removal of infected mesh primary closure with JP drainage." The date of the second surgery is somewhat unclear. One of the surgeon's notes indicates that the procedure was performed on "2/17/02" and the parties apparently accepted that date at the CCH, while another of the surgeon's reports dated January 31, 2002, refers to the second surgery as having already been completed ("the mesh had to be removed"). Another doctor, in a report dated January 24, 2002, refers to the second surgery "[a]pproximately a week ago." The claimant's appeal asserts the second surgery was on "1/17/02."

There was conflicting evidence regarding the cause of the hernia, whether it was due to lifting at work or coughing or straining on the toilet at home. How the hernia was caused is strictly a question of fact for the hearing officer to resolve. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Section 410.165(a) provides that the hearing officer, as finder of fact is the sole judge of the weight and credibility that is given to the evidence. The hearing officer may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer's determination on the compensability of the hernia is supported by the evidence and nothing in our review of the record reveals that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709

S.W.2d 175, 176 (Tex. 1986). Accordingly, the hearing officer's decision on compensability of the hernia is affirmed.

Disability is defined in Section 401.011(16) as the inability of the compensable injury to obtain and retain employment at the preinjury wage. Once the hearing officer determined that the hernia was compensable, the claimant, at a minimum, had some periods of disability while the hernia was being operated on, during some period of convalescence, and for the second surgery. The hearing officer found that the claimant did not have disability because she "was able to do vacuuming and laundry during the period when Claimant was not working for employer, that Claimant's job duties were not strenuous, and that someone else could have lifted the crates for the Claimant." The claimant testified that she was unable to work on October 24, 2001, through the end of February 2002. In evidence are off work slips from doctors taking the claimant off work (which the hearing officer could ignore) and an opinion that the postoperative recovery period from surgery was "6-8 weeks post op." Given the hearing officer's decision that the hernia was compensable, as affirmed in this decision, the determination that the claimant did not have any disability is against the great weight and preponderance of the evidence.

We reverse the hearing officer's decision of no disability and remand the case for the hearing officer to consider the claimant's (and other witness') testimony, the undisputed surgeries, medical reports and off work slips, and a "common sense" recovery period in determining some period of disability. The hearing officer, at his discretion, may receive some additional evidence on the limited aspect to determine when the second surgery occurred and when the claimant returned to work.

The true corporate name of the insurance carrier is **ZNAT INSURANCE COMPANY** the name and address of its registered agent for service of process is

**JEFF W. AUTREY
400 WEST 15TH STREET SUITE 710
FIRST STATE BANK TOWER
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Philip F. O'Neill
Appeals Judge